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No. 108

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In The
Supreme Court of the United States

OCTOBER TERM, 1966

WALTER PETRONIA and ROSE PETRONIA, his wife;
MORRIS K. NAINOA and MARCELLA NAINOA, his wife;
CHARLES FRANKLE and HILDA FRANKLE, his wife; and
JOHN W. MASSEY, *Appellants,*

vs.

STATE OF ALASKA, one of the United States, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF WASHINGTON

MOTION TO DISMISS

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THE ARGUS PRESS — SEATTLE, WASHINGTON

No. 1314

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MOTION TO DISMISS

The appellee, State of Alaska, moves pursuant to Rule 16(b) to dismiss the appeal herein on the ground that it does not present a substantial federal question.

This appeal arises from a case which was presented to a Washington State trial court on stipulated facts which reduced the controversy to one major legal issue, i.e.,

"Can the State of Alaska constitutionally levy a tax on the net income of seamen engaged in interstate and foreign commerce, where the tax is levied only on that portion of the seamen's net income which is attributable to their activity within the territorial boundaries of the State of Alaska?"

The Alaska tax was attacked on the grounds it violated the Commerce Clause and violated due process of law protected by the Fourteenth Amendment, United States Constitution.

The apportionment of wages earned in Alaska by the appellees was not questioned.

Recognizing that the issues raised by the pleadings and briefs below were strictly federal, the appellee contends that in light of existing authority the question is not so substantial as to warrant further consideration.

1. The question of whether the activity of merchant seamen engaged in operation of vessels plying Alaska waters enroute to or from Alaska ports is such as to allow Alaska to tax a fairly apportioned part of the net income derived without violation of due process of law, has been substantially resolved by decisions of this Court.

There is no longer a substantial question that an income tax fairly apportioned to activities conducted within the taxing state is not in conflict with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

As early as *Shaffer v. Carter*, 252 U.S. 37, 40 S. Ct. 221, 64 L.Ed. 445 (1919), upholding an Oklahoma state net income tax as applied to nonresidents, this Court stated:

> "In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property and business transactions, within their borders; they assume and perform the duty of preserving and protecting all such persons, property and businesses, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses" 252 U.S. at 50.
>
> "That the state, from whose laws property and business and industry derive the protection without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement" 252 U.S. at 50.

See also, *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 64 L.Ed. 460 (1919).

This Court has on several occasions discussed the minimal connections between an income producing activity and state taxation of that income necessary to satisfy due process requirements. Thus, in the case of *Ott. v. Mississippi Valley Barge Line Co.*, 366 U.S. 169, 69 S. Ct. 432, 93 L.Ed. 585 (1949), it was stated:

> "So far as due process is concerned, the *(ad valorem)* tax in practical operation has relation

> to opportunities, benefits or protection conferred or afforded by the taxing state. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state" 366 U.S. at 173.

Stated in a different manner is *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435 at 444.

> "The simple but controlling question is whether the state has given anything for which it can ask return."

The Court in *Wisconsin v. J. C. Penny Co., supra,* discussed the power of a state to tax in relation to opportunities which it gives and benefits conferred by reason of being an orderly, civilized society. The fact stipulation filed by the parties in the trial court discloses that Alaskan business afforded, during the year in question, a minimum of 17% of his income in the case of appellant Petronia, 26% in the case of appellant Frankle, 16% in the case of appellant Nainoa, and that appellant Massey also earned a considerable portion of his income within the State of Alaska. There is but little question that Alaska has therefore afforded the opportunities and benefits contemplated by this Court in the *Ott* and *J. C. Penney Co.* decisions. It is now beyond question that any regular, continuous, systematic, designed, competitive business activity carried on within a state, is sufficient to give that state taxing jurisdiction. *McGee v. International Shoe Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 (1957).

After discussing some of the decisions cited above the Washington Supreme Court in announcing the decision here appealed from, stated:

> "Probably the most significant benefits in the eyes of these defendant seamen (appellants here) are the wages they contemplated receiving for their services during the course of the vessel's voyage. The business productivity generated by Alaska was accountable for the wages earned by the defendants (appellants) when they were in Alaskan waters" 418 P.2d at 758.

In light of the several decisions of the United States Supreme Court and the conclusion reached by the Washington Supreme Court, little doubt remains that the taxing power of the State of Alaska properly reaches that portion of appellants' net income which is fairly attributable to their employment within the state.

2. A fairly apportioned income tax on the wages of seamen has so little effect on the interstate commerce in which a vessel is engaged that no unconstitutional burden could be present.

Bearing in mind the fact that the Alaska tax is being questioned as applied to the personal income of employee-seamen and not to the interstate carrier itself, it becomes apparent that any issues arising from the Commerce Clause of the United States Constitution have been substantially laid to rest by earlier decisions of this Court.

It has long been recognized that an income tax which applies to income derived from interstate activity differs substantially from a tax on the interstate activity itself. *Philadelphia & Southern Mail Steamship Co. v. Penna.*, 122 U.S. 326, 30 L.Ed. 1200 (1886). Thus, when Wisconsin sought to apply its net income tax to a domestic corporation engaged in interstate commerce, this Court recognized that a tax which merely affects profits from interstate commerce is not a direct burden thereon. *U. S. Glue v. Town of Oak Creek*, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135 (1918). The rule of *U. S. Glue* was subsequently broadened to include a nonresident corporation engaged exclusively in interstate commerce. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

This Court has also resolved questions of the application of state net income taxes to nonresident individuals. Such a tax was sustained against attacks based on the Commerce Clause in *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1919), wherein it was recognized that a tax on the proceeds of interstate commerce is not a tax on the source of the income. Accordingly, in *New York ex rel Cohn v. Groves*, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666 (137), this Court stated:

> "Neither the privilege nor the burden is affected by the character of the source from which

the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source."

Here the appellants contest a tax of the State of Alaska, not as it is applied to the equipment or profits of an interstate carrier, but merely to a portion of the income of such carrier's employees engaged in the operation of its vessels.

The line of cases which the appellee believes have substantially resolved the questions here presented culminated in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S.Ct. 357 (1959). There is no principle of admirality which requires uniformity of state taxation and therefore causes this case to be afforded different treatment. See *Standard Dredging Co. v. Murphy,* 319 U.S. 306, 87 L.Ed. 1416 (1939).

The appellee concedes that the factual background against which this case arises differs from any previously before this Court.[1] In the context of broad constitutional policy, however, these differences are of little consequence when viewed in light of *Northwestern States Portland Cement, supra,* and its predecessors.

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[1]Essentially the same Alaska revenue provision was before the Ninth Circuit in *Alaska Steamship Co. v. Mullaney,* 180 F.2d 805 (1950). That Court found no violation of the Due Process Clause or Commerce Clause in Alaska's taxation of seamen's wages.

CONCLUSION

The decision of the Supreme Court of Washington, sustaining the validity of Alaska's tax was firmly supported by pertinent decisions of this Court. In light of these decisions this appeal presents no substantial federal question and should be dismissed.

DATED at Juneau, Alaska, this 26th day of June, 1967.

Respectfully submitted,

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